No. 22,395

IN THE

United States Court of Appeals

For the Ninth Circuit

SHAFFER C. TIM,
Appellant,

vs.

AMERICAN PRESIDENT LINES, LTD., a corporation,
Appellee.

Appeal from an Admiralty Decree of the United States District Court for the Northern District of California

Honorable Lloyd H. Burke, District Judge

APPELLANT'S BRIEF

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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The following findings of fact and conclusions of law are set forth by the court in its Findings of Fact in the Clerk's Transcript on file herein.

I

FACTS

The plaintiff, Shaffer C. Tim, was employed by defendant as a seaman aboard the SS. PRESIDENT TYLER in the capacity as chief electrician and was

so employed on February 2, 1965 when he suffered an accident in the course and scope of his employment. (Findings of Fact No. 2.)

The defendant, American President Lines, Ltd., owned and operated the SS. PRESIDENT TYLER. On the date of the accident, February 2, 1965, cargo at the No. 4 hatch of the SS. PRESIDENT TYLER was being worked by employees of Matson Terminals, Inc. The loading and unloading of the cargo then aboard the SS. PRESIDENT TYLER was done pursuant to a contract between the United States Government and American President Lines and pursuant to a contract between the United States Government and Matson Terminals. These contracts were not regarded by the trial judge as having significance insofar as the judgment reached by that court was concerned. (Findings of Fact No. 3.)

The cargo was being worked by use of a mechanical apparatus known as a gantry crane. The gantry crane was operated from a cab mounted upon the crane about 30 feet above the weather deck and over the No. 4 hatch. The "operating unit" relevant to this action consisted of the operator's cab, the controls to operate the crane inside the cab, a steel mesh platform to starboard and outside of the operator's cab, and a safety screen which, when in the "non-operating" position, lay over the top of the operator's cab and, when in the "operating position", extended over the platform outside the operator's cab. (Findings of Fact No. 6.)

In order to enter the operator's cab it was necessary to descend four steps, each step consisting of one horizontal steel bar, to reach the mesh platform. Once on the steel mesh platform one would turn left and enter through a door to the operator's cab, which was approximately 5 feet square. Inside the operator's cab were the controls of the gantry crane and a chair which faced forward away from the entry door to the operator's cab and from which the gantry crane operator would operate the gantry crane. (Findings of Fact No. 6.)

The plaintiff, Shaffer C. Tim, had worked on board the SS. PRESIDENT TYLER less than 7 days and had never worked on a vessel that had a gantry crane prior to signing aboard the SS. PRESIDENT TYLER. (Findings of Fact No. 7.)

The gantry crane operator's cab had a safety screen over the top of it which, if extended to its starboard-most position, engaged an electrical circuit which energized the gantry crane and allowed it to operate. When the safety screen was moved about 2 to 3 inches to port from its "operating position" the electrical circuit was de-energized and the gantry crane unit would not operate. (Findings of Fact No. 8.)

The safety screen in question had been installed by the defendant as a result of there having been an injury involving the operation of the gantry crane previous to that occurring to the plaintiff. This injury occurred before any safety screen was provided and led to the installation of the safety screen in

existence at the time of the injury occurring to the plaintiff. (Findings of Fact No. 9.)

The distance between the safety screen and the steel mesh platform below it when the safety screen was extended over the platform was less than 5 feet 6 inches. The plaintiff was 5 feet 6 inches tall. The safety screen was not large enough to prevent partial physical egress from the steel mesh platform and it was physically possible for the safety screen to have been larger. (Findings of Fact No. 16.)

At about 8:30 a.m. on February 2, 1965 a supervisory employee of Matson Terminals, Inc., the stevedoring company, complained to plaintiff that the gantry crane was not operating fast enough and requested plaintiff to remedy that situation. Pursuant to that request, plaintiff went to the operator's cab of the gantry crane (which was then occupied by Harry Johnson) and made adjustments which allowed the gantry crane to move athwartship at a faster speed. (Findings of Fact No. 12.)

After plaintiff made the necessary adjustments to allow the gantry crane to move faster, he stood behind Harry Johnson (the stevedore's employee assigned to operate the gantry crane). At the time the plaintiff was standing behind Harry Johnson he was inside the operating cab and was observing the gantry crane operation. Plaintiff then noticed that an electrical cable leading to another portion of the gantry crane had become disengaged from its reel and he told Harry Johnson, the gantry crane operator, that he

wanted to inspect the electrical cable. (Findings of Fact No. 13.)

In response to plaintiff's request Harry Johnson, the gantry crane operator, brought the gantry crane to a stop. (Findings of Fact No. 13.)

After waiting for the crane operator, Harry Johnson, to stop the crane, plaintiff then proceeded to the steel mesh platform outside the operator's cab. (Findings of Fact No. 14.)

At that time the safety screen above the steel mesh platform was at its starboardmost position, which allowed the gantry crane to operate. In order to inspect the electrical cable plaintiff, by placing his feet on the second rung of the ladder leading to the platform and placing his head outside the safety screen, was able to and did put his head into the space outside the screen, without placing the safety screen in a nonoperative position, and thus shutting off the power of the gantry crane. (Findings of Fact No. 14.)

The plaintiff relied on Harry Johnson, the operator of the gantry crane, not operating the crane while plaintiff was in this position and pursuant to plaintiff's requesting Harry Johnson to bring the gantry crane to a halt and the gantry crane thus being brought to a halt before plaintiff placed himself in this position. (Findings of Fact No. 14.)

While plaintiff had his head outside the safety screen the gantry crane operator started the gantry crane and plaintiff's head was caught and injured between the outboard portion of the safety screen and

a stationary overhead object which came into contact with plaintiff's head because of movement of the gantry crane. (Findings of Fact No. 14.)

II

ISSUES

A. DEFENDANT, AMERICAN PRESIDENT LINES, LTD., IS LIABLE FOR THE NEGLIGENT ACT OF THE STEVEDORE'S EMPLOYEE PERFORMED IN THE COURSE AND SCOPE OF HIS EMPLOYMENT ON BOARD THE DEFENDANT'S VESSEL.

The trial court, in its Findings of Fact and Conclusions of Law, stated the following:

> "1. Matson Terminals, Inc. was not the agent of American President Lines within the meaning of the common law agency concept or of 45 U.S.C., Section 51, as interpreted by the Supreme Court cases of *Sinkler v. Missouri Pacific Railroad Company,* 356 U.S. 326 (1958) and *Hopson v. Texaco,* 383 U.S. 262 (1966) and was therefore, not performing operational activities of the respondent at the time of the accident.
>
> "2. It was negligent of the gantry crane operator to operate the gantry crane when plaintiff was on the platform outside the operator's cab under the circumstances described.
>
> "3. At all material times the gantry crane was operated by Harry Johnson, an employee of Matson Terminals, Inc.
>
> "4. The loading and unloading of the cargo then aboard the SS. PRESIDENT TYLER was done pursuant to a contract between the United States Government and American President Lines

and pursuant to a contract between the United States Government and Matson Terminals, Inc. These contracts were not regarded by the trial judge as having significance insofar as the judgment reached was concerned."

In addition to the above findings, the trial court made some pertinent statements relative to its positions and observations as to the law controlling in this matter:

"The Court: I would have no difficulty with the case were it not for some implications in the *Hopson* case. However, there is a valid cause for distinction on the basis that the taxicab driver was the agent of the vessel performing a function which the vessel was legally obligated to perform, which would be the means by which you could distinguish those cases upon which Mr. Graham relies." (See R.T. dated March 29, 1967 at page 42, lines 21 through 25.)

"The Court: I think you are right. I would have difficulty in reaching the decision that the Supreme Court reached in its ultimate decision on the case [*Hopson v. Texaco, Inc.*, 383 U.S. 262, 86 S. Ct. 765]. But as I have been reminded on other occasions, I am not in the Supreme Court." (See R.T. dated March 29, 1967, page 46, lines 4 through 8.)

"The Court: Well, I think in order to find in favor of the libelant in this case, I would almost have to go the full route and say whatever happens to a seaman on board a vessel, regardless of what the conduct may be, the vessel is liable. I don't think the law has reached that point, although I may be very much in error." (See

R.T. dated March 29, 1967, page 48, lines 12 through 17.)

It is submitted that the court's comments obviously show the court's failure to recognize that the holding in *Hopson v. Texaco, Inc.,* 383 U.S. 262, 86 S. Ct. 765 (1966), does not stand for the proposition that a ship is liable for any injuries, regardless of the conduct giving rise to the injuries, that occurred to a seaman on board a vessel.

In the *Hopson* case, supra, the court held:

"The Jones Act incorporates the standards of the Federal Employers Liability Act as amended which renders an employer liable for the injuries negligently inflicted on its employees by its 'officers, agents or employees'. We noted in *Sinkler v. Missouri Pacific Railroad Company,* 356 U.S. 326, 78 S. Ct. 758, 2 L. Ed. 2d 799, that the latter act was an avowed departure from the rules of the common law which, recognizing the cost of human injury and an inescapable expense of railroading, undertook to adjust that expense equitably between the worker and the carrier. In order to give an accommodating scope . . . to the word 'agents' we concluded that when (an) . . . employee's injury is caused in whole or in part by the fault of others performing under contract, operational activities of his employer, such others are agents of the employer within the meaning of Section 1 of FELA." (383 U.S. at pages 263-264.)

The court went on to state:

"Getting these two ill seamen to the United States Counsel's office was therefore the duty of

> respondent. And it was respondent—not the seamen—which selected, as it had done many times before, the taxi service. Respondent—the law says—should bear the responsibility for the negligence of the driver which it chose. This is so because as we said in *Sinkler,* justice demands that one who gives his labor to the furtherance of the enterprise should be assured that all combining their exertions with him in the common pursuit will conduct themselves in all respects with sufficient care that his safety while doing his part will not be in danger." (383 U.S. at page 264.)

This concept was more specifically referred to in the case of *Sinkler v. Missouri Pacific Railroad Company,* 356 U.S. 326, 78 S. Ct. 758, wherein the court stated:

> "It was the concept of Federal Employers Liability Act that the railroad was a unitary enterprise, and that its economic resources were obligated to bear the burden of all injuries befalling those engaged in the enterprise *arising out of the fault of any other member engaged in the common endeavor.*" (Emphasis added.) 356 U.S. at page 330.

The proposition set forth in the *Hopson* and *Sinkler* decisions, supra, limits the scope of liability of the vessel to injuries incurred as the result of negligence on the part of an individual "engaged in the common endeavor" or "operational activities" of the vessel.

The findings of the trial court below conclude that a longshoreman (the stevedore's employee) working

on board defendant's vessel in the scope and course of his employment of unloading cargo from the vessel is not engaged in the "common endeavor" or the "operational activities" of the vessel.

The trial court erred in failing to recognize that a longshoreman working on board defendant's vessel unloading defendant's cargo was clearly engaged in the ship's "operational activities" as set forth in the *Hopson* case, supra. The court erroneously concluded, as set forth above, that to hold that a longshoreman under such circumstances comes within the definition of "operational activity" would be to hold that whatever happened to a seaman, *regardless of what the conduct was,* would constitute liability. (Emphasis added.)

The instrumentality involved in causing injury to a seaman in *Hopson v. Texaco, Inc.,* supra, was that of an independent contractor (a taxi driver) whose services were secured for the purpose of transporting a disabled merchant seaman from his vessel to a local doctor. The taxicab driver was negligently involved in an automobile accident causing injury to the seaman.

In *Sinkler v. Missouri Pacific Railroad Company,* supra, the Supreme Court of the United States held that where defendant railroad's car, while under control of switching company's switching crews, was being handled to further the task of defendant railroad's enterprise, defendant railroad was liable for injury to its employee caused by fault of switching

company's employees, even if switching company was not under control of defendant railroad, in view of the fact that switching company, while engaged in such operations was an agent of defendant railroad within the meaning of the Federal Employers Liability Act.

Thus the Supreme Court recognized that the rule pertaining to "operational activity" turns on the question of whether the negligent party was engaged in furthering the "common endeavor" and did not turn on whether the defendant in fact had control of the negligent party. "This is so because as we said in *Sinkler,* justice demands that one who gives his labor to the furtherance of the enterprise should be assured that all combining their exertions with him in the common pursuit will conduct themselves in all respects with sufficient care that his safety while doing his part will not be in danger." (See: *Hopson v. Texaco, Inc.,* supra, 383 U.S. at page 263.) (See also: *Leek v. Baltimore and Ohio Railroad Company,* 200 F. Supp. 368; *Carney v. Pittsburgh and Lake Erie Railroad Company,* 316 F. 2d 277.)

The recognition by the Supreme Court that the shipowner has a non-delegable duty and cannot avoid that responsibility by arguments of independent contractor, lack of control over the negligent party, or that the equipment used by the longshoreman is not defective, was most recently reiterated in the case of *Mascuilli v. United States,* 387 U.S. 237, 1967 A.M.C. 1702.

The question in *Mascuilli,* supra, presented to the Supreme Court on certiorari was:

> "Does dangerous condition caused by stevedore's negligent handling of proper equipment render vessel unseaworthy and its owner liable for resulting injuries?"

In the *Mascuilli* case, supra, a longshoreman, Mascuilli, had been killed during a loading operation when one or more of his fellow longshoremen negligently caused both the starboard and port vangs on the loading boom to become taut simultaneously, thus causing one of the vangs to break. The parts thereof fell on Mascuilli, who had been engaged in a different aspect of the loading operation, and inflicted mortal wounds. The District Court sitting without a jury expressly found that the loading equipment was in a sound and safe condition. Finding of Fact No. 35 read as follows:

> "No. 35. In summary, the court finds that the vessel and all of its equipment was in a seaworthy condition at all times, and remained so throughout the entire loading operations. The accident was caused solely by the negligent operation of the stevedoring crew using seaworthy equipment in such a manner as to cause the accident to occur *so instantaneously* that the third officer was unable to warn anyone or prevent its happening." (See: *Mascuilli* case, 241 F. Supp. at 362.)

The Third Circuit affirmed the holding that the vessel was not unseaworthy solely on the basis of the

District Court's Finding No. 35 that the accident had been caused solely by the negligence of the stevedoring crew. (See *Mascuilli* case, 358 F. 2d at 133.)

The Supreme Court thereupon summarily reversed citing *Mahnich v. Southern SS. Company,* 321 U.S. 96, 64 S. Ct. 455, and *Crumady v. Joachim Hendrik Fisser,* 358 U.S. 423, 79 S. Ct. 445. (For other decisions reaching the same results see: *Alexander v. Bethlehem Steel Corporation,* 382 F. 2d 963, 1967 A.M.C. 2324; *Candiano v. Moore-McCormack Lines,* 382 F. 2d 961.)

It is submitted that the above authorities clearly substantiate the proposition that a longshoreman, while acting in the scope and course of his employment of discharging cargo from defendant's vessel, comes within the definition of "operational activity" and creates liability on the part of defendant vessel for injuries sustained by plaintiff seaman who also is working in the scope and course of his employment on board defendant's vessel.

B. THE PLAINTIFF, A SEAMAN IN THE EMPLOY OF DEFENDANT, WHILE ACTING IN THE COURSE AND SCOPE OF HIS EMPLOYMENT, HAD THE RIGHT TO RELY ON THE STEVEDORE PERFORMING HIS DUTY WITH CARE AND IS, THEREFORE, NOT CONTRIBUTORILY NEGLIGENT.

The trial court found:

"12. At about 0830 on February 2, 1965, a supervisory employee of Matson Terminals, Inc. complained to libelant that the gantry crane was not

operating fast enough and requested libelant to remedy that situation. Pursuant to that request, libelant went to the operator's cab of the gantry crane (which was then occupied by Harry Johnson) and made adjustments which allowed the gantry crane to move athwartship at a faster speed.

"13. After libelant made the necessary adjustments to allow the gantry crane to move faster, he stood behind Harry Johnson, inside the cab, and observed the gantry crane operation. Libelant then thought he noticed that an electrical cable leading to the spreader apparatus of the gantry crane had become disengaged from its reel and he told Johnson, the gantry crane operator, that he wanted to inspect the electrical cable and Johnson brought the gantry crane to a stop in response to libelant's request.

"14. After waiting for the crane operator, Harry Johnson, to stop the crane, libelant then proceeded to the steel mesh platform outside the operator's cab. At that time the safety screen was at its starboardmost position, which allowed the gantry crane to operate. In order to inspect the electrical cable reel, libelant, by placing his feet on the second rung of the ladder leading to the platform and craning his head outside and atop the safety screen, was able to and did put his head into the space outside the screen, without placing the safety screen in the non-operative position and shutting off the power. Libelant assumed the operator of the gantry crane would not operate the crane while libelant was in a position of danger. While libelant had his head outside the safety screen, the gantry crane opera-

tor started the gantry crane and libelant's head was caught and injured between the outboard portion of the safety screen and a stationary overhead object which came into contact with libelant's head because of the movement of the gantry crane."

In the Reporter's Transcript dated March 15, 1957 it is shown that plaintiff testified he would not have placed himself in this position had he known the crane was going to operate and the court agreed. (R.T. 19:2-11.)

The court also agreed that plaintiff never expected that the operator "would be stupid enough to start the equipment" (the court's choice of words) while plaintiff was in this position. (R.T. 33:16-22.)

The evidence also shows that plaintiff placed himself in this position only for a few seconds (R.T. 39:7-8) and it was in this few seconds that the crane was negligently operated by the crane operator.

The court also noted its complete acceptance of the plaintiff's testimony and that the only issue involved was a question of law. (R.T. 43:14-25.)

The trial court erroneously made the following conclusions:

"1. That plaintiff's conduct, which might be argued to constitute assumption of risk, did constitute instead negligence.

"2. That a seaman can be negligent for assuming that the defendant, through its agents, will exercise proper care for his safety until notified to the contrary."

operating fast enough and requested libelant to remedy that situation. Pursuant to that request, libelant went to the operator's cab of the gantry crane (which was then occupied by Harry Johnson) and made adjustments which allowed the gantry crane to move athwartship at a faster speed.

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"1. That plaintiff's conduct, which might be argued to constitute assumption of risk, did constitute instead negligence.

"2. That a seaman can be negligent for assuming that the defendant, through its agents, will exercise proper care for his safety until notified to the contrary."

It is submitted that plaintiff's conduct did not constitute negligence and that the plaintiff is under no duty to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or those for whose conduct the employer is responsible, but the plaintiff may assume that the employer or his agent has exercised proper care for his safety until notified to the contrary and that plaintiff cannot be held to be negligent when making that assumption.

There is a danger of confusing the defenses of assumption of risk and contributory negligence and this danger was very aptly set forth by Justice Holmes in the case of *Schlemmer v. Buffalo R & T Railroad Company,* 205 U.S. 1, 27 S. Ct. 407. Therein the court stated:

> "Assumption of risk in this broad sense obviously shades into negligence as commonly understood. Negligence consists of conduct which common experience *with a special knowledge of the actor* shows to be *so likely to produce the result complained of, under the circumstances known to the actor,* that he is held answerable for that result, although it was not certain, intended, or foreseen. He is held to assume the risk upon the same ground. . . . But the difference between the two is one of degree rather than of time; and when a statute exonerates a servant from the former (assumption of the risk), if at the same time it leaves a defense of contributory negligence still open to the master (a matter upon which we express no opinion), then, unless great care be taken, the servant's rights will be sacrificed by

simply charging him with assumption of risk under another name." (27 S. Ct. 407 at 409.)

In the case at bar the evidence is uncontradicted that the plaintiff, Shaffer C. Tim, advised the operator of the crane that he was going to place himself in a situation where danger existed and communicated a desire to the operator that he bring the crane to a halt in order to allow plaintiff to perform his job. The evidence is also uncontradicted that the plaintiff waited until the operator did bring the crane to a stop in response to plaintiff's request and only then did he proceed to the platform to observe the spreader reel.

Under such circumstances the law is clear that the plaintiff, Shaffer C. Tim, was under no duty to exercise care to discover extraordinary dangers that may arise from the negligence of the shipowner or those for whose conduct the shipowner is responsible, but that the plaintiff may assume that the employer or his agent have exercised proper care for his safety until notified to the contrary. (See: *The Norland,* 101 F. 2d 967 at 974. See also: *Aivaliotis v. SS. Atlantic Glory,* 214 F. Supp. 568 at 574.)

This same proposition has been recognized by the United States Supreme Court *(Chesapeake v. De Atley,* 241 U.S. 310, 36 S. Ct. 564 at 567) and the Fifth Circuit Court of Appeals in *Ballard v. Atchison, Topeka and Santa Fe Railway Company,* 100 F. 2d 162 at 164. (For similar holdings in state courts see: *Crowder v. Atchison, Topeka and Santa Fe Rail-*

way, 117 Cal. App. 2d 68; *Murphy v. St. Claire Brewing Company,* 41 Cal. App. 2d 535; *Clark v. State of California,* 99 Cal. App. 2d 616; *Cooper v. Lunsford,* 234 Cal. App. 2d 554.) In these decisions the court pointed out that the injured plaintiff, under the Federal Employers Liability Act, had the right to presume that the negligent employee of the railroad involved would do his duty and that under such circumstances the plaintiff could not be considered to have also been negligent for presuming the defendant's employee would do his duty.

To allow each seaman to rely on the fact that other shipboard employees are not going to be negligent and will properly perform their duty is not only a practical rule but one of necessity. If, in fact, the seaman cannot rely on other shipboard employees to perform their duty properly, a ship could not either efficiently, or in a practical, manner, be operated.

The plaintiff, in the case at bar, might have been held negligent if he had gone to the platform *without first advising the operator* and thus merely hoped that the operator would not reactivate the crane before the plaintiff was finished with his job. But this type of negligent conduct was not, in fact, performed by the plaintiff. On the contrary, the plaintiff took great care to advise the operator of his proposed actions and even then did not move until the operator, in fact, brought the crane to a halt in response to the plaintiff's request.

It is submitted that the authorities set forth above clearly substantiate the proposition that the plaintiff

here cannot be held negligent for exercising his right to assume that defendant's agent will conduct himself in a safe manner and thereby perform his duty. It is submitted that it is incongruous to hold that by exercising a right plaintiff can, in any degree, be negligent. This is especially true in view of the fact as set forth above that the court concluded that plaintiff would not have placed himself in the position he did had he known the crane was going to operate and that plaintiff, *in fact,* never expected the crane operator to "be stupid enough to start the equipment". In other words, in view of these conclusions drawn by the court and the authorities set forth above (see: *Schlemmer v. Buffalo R & T Railroad Company,* supra) the plaintiff did not have any "special knowledge" that showed his conduct would "be so likely to produce the result complained of" or that the circumstances were "known to" the plaintiff.

C. THE TRIAL JUDGE, AS A TRIER OF FACT, CANNOT MAKE A FINDING ON DAMAGES AFTER HAVING ONCE FIRST CONCLUDED THERE IS NO LIABILITY ON THE PART OF DEFENDANT.

The court made one finding as to damages. In Finding No. 26 the court found:

> "The damages suffered by libelant, after applying the rule of maritime comparative negligence, would be $7,500.00, if respondent were legally responsible therefor."

The court failed to make any finding as to what injuries were sustained by the plaintiff nor the

amount of wage loss sustained by the plaintiff, including past and future wage loss.

That is to say that the trial court failed to make any finding on the issue of "nature and extent of injuries" that was set forth in the pre-trial order filed in this matter.

Furthermore, plaintiff in this action requested the following conclusion of law:

> "No. 9: Libelant had the right to rely on Harry Johnson, an employee of Matson Terminals, Inc., to perform his stevedoring duties in a non-negligent and safe manner."

The trial court failed to make a conclusion of law relative to this issue.

Rule 52(a) of the Federal Rules of Civil Procedure provides that the trial court, as a trier of fact, shall make findings of fact. The purpose of findings of fact is to enable the appellate courts to perform their function of promoting justice on the facts of each case as well as to establish general uniformity in law and Rule 52(a) utilizes the former and more complete equity review of both law and fact for all court actions. (See: *Moore's Manual, Federal Practice and Procedures,* page 1682, and authorities cited therein.)

The trial court's conclusion that the damages suffered by the plaintiff in this action amounted to $7,500.00, coupled with its failure to make any findings of fact or conclusions of law relative to the nature and extent of injuries sustained, deprives this appellate court of its reviewing power to consider whether the court's findings on the facts relative to

nature and extent of injuries substantiates the court's findings on damages in the amount of $7,500.00. Consequently, this reviewing court and appellant are left with the conclusion that appellant sustained damages in the amount of $7,500.00 but appellant and this court are denied the opportunity to determine whether these damages were based on the wages lost by appellant, whether the damages included a loss for both past and future wage loss, whether the damages were based solely on a conclusion by the court that no damages were lost and the damages were based solely on pain and suffering sustained by the appellant.

However, more significantly, the trial court erred in exceeding its power, as trier of fact, in drawing any conclusions or making any findings on the question of damages. Certainly it is clear that if the case had been tried before a jury the jury would be precluded in making any findings relative to damages after it first once concluded that the defendant was not liable. Rule 52(a) of the Federal Rules of Civil Procedure does not contemplate the trier of fact, when it is the court, to exercise powers as trier of fact in excess of those powers granted to a jury.

This concept was very aptly discussed in the case of *Sonken-Galamba Corporation, et al. v. Atchison, Topeka and Santa Fe Railway Company,* 34 F. Supp. 15 at page 16 wherein the court stated:

> "The theories which prompted the filing of this motion were not only that the findings of fact and conclusions of law which the court made

were erroneous, but the theory that a trial court, when trying a case at law in which a jury has not been demanded, not only should make such findings of fact as will support the judgment reached, but also should make such findings of facts as will fully present to any reviewing court every possible view of the case presented by plaintiff's petition and evidence, so that the reviewing court might have before it sufficient facts found by the trial court to support a judgment for the party other than the party to which the trial court has given judgment. To illustrate very simply, the theory is that if a suit for damages for personal injuries is tried to a trial court without a jury and the trial court finds that the defendant was not negligent and, therefore, that the plaintiff is not entitled to recover damages, the trial court also should find that, if the defendant was negligent, the plaintiff has been damaged in the amount of $5,000.00.

"With all respect for learned counsel, who have presented their views in this and all other connections with superb ability, I cannot subscribe to nor adopt this theory. While nothing of the kind was intended by counsel, the theory is degrading to a trial court. A United States District Court's judge, though the humblest in rank in Federal judicial hierarchy, occupies an honorable position. He is not a mere special master taking testimony for the benefit of some other court and, being a mere special master, making findings on every theory involved in the case. He is not a mere referee. He is something more than a 'whistling post' on the highway to an ultimate destination. His court is the court in which the case is to be decided and judgment pronounced,

> subject only to possible review for errors committed. It is entirely inconsistent with such a view of the trial court that the judge thereof, having found the facts which, in his opinion, support the judgment reached, should proceed to make wholly superfluous and immaterial findings.
>
> "It seems to me that the trial court should make only such findings of fact and state only such conclusions of law which are contemplated by Rule 52, Rules of Civil Procedure for District Courts, 28 U.S.C.A. following section 723c. That rule provides that 'in all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law and direct the entry of the appropriate judgment'.
>
> "I consider that this rule does not contemplate that there shall be findings of fact wholly inappropriate to the judgment entered and necessarily discarded, as unproved or immaterial, in connection with the conclusions of law reached. The facts to be found are the ultimate facts established by the evidence and supporting judgment."

It is submitted that the trial court exceeded the scope of its authority as the trier of fact on the issue of plaintiff's damages and then compounded such error by failing to make proper findings on the damage issue.

The trial court's action in this regard creates an impossible situation. The appellant is deprived of the opportunity to argue to this court that the trial court's conclusions on damages are, in fact, unsubstantiated by the evidence because neither appellant

nor this court can ascertain from the findings below what evidence and what facts the court used to come to its conclusion on the damage issue.

Furthermore, the trial court's finding that plaintiff was fifty per cent contributorily negligent is also erroneous without a basis in fact or in law upon which the court could make such a conclusion on this appeal. The entire issue of damages necessarily is an open question on this appeal and, if the plaintiff is successful on the liability issue then the damage issue should be presented to the new trier of fact in its entirety. To hold otherwise presents the following questions to this court:

If this court concludes that the plaintiff was not contributorily negligent for exercising his right to rely on the stevedore performing his duty in a non-negligent manner, then does the appellate court as a matter of law (in view of the trial court's conclusion that damages amounted to $7,500.00) direct that judgment be entered in the amount of $15,000.00? If not, then does the appellate court direct that judgment be entered in favor of the plaintiff, but that the issue of damages be retried, but that the damages cannot be in excess of $7,500.00 or $15,000.00?

It is because of this dilemma that the very purpose of Rule 52(a), as discussed in the authorities set forth above, is to confine the trier of fact to the issue of liability first and that in the event the trier of fact concludes defendant is not liable, that no findings and no conclusions should be made on the question of damages.

III

CONCLUSION

It is submitted that the above authorities require that the decision of the trial court below be reversed with direction that judgment in favor of plaintiff should be entered on the question of liability of the defendant without deduction for contributory negligence, and that this cause should be remanded for a new trial solely on the question of the nature and extent of the injuries and damages sustained by the plaintiff.

Dated, San Francisco, California,
March 11, 1968.

Respectfully submitted,
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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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